UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 33

KANKAKEE NURSING & REHABILITATION CENTER, LLC

Employer[1]

and

Case 33-RC-4769

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 881

Petitioner[2]

REGIONAL DIRECTOR'S
DECISION AND DIRECTION OF ELECTION

The Employer, Kankakee Nursing & Rehabilitation Center, LLC, operates a skilled care nursing and rehabilitation facility. The Petitioner, United Food and Commercial Workers Union, Local 881, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent the Employer's Licensed Practical Nurses (LPNs). A hearing officer of the Board held a hearing and the parties filed briefs.

As evidenced at the hearing and in the briefs, the parties disagree on two issues: (1) whether the LPNs are statutory supervisors, and (2) whether the only appropriate unit must also include Registered Nurses (RNs). Contrary to the Union, the Employer contends that the LPNs are supervisors because they have the authority to discipline employees and to assign work. If the LPNs are not found to be supervisors, the Employer further contends that the only appropriate unit must also include RNs because all of the Employer's LPNs and RNs are

[1] The Employer's name appears as amended at hearing.

[2] The Petitioner's name appears as amended at hearing.

classified as charge nurses and share the same community of interest. The Petitioner contends that a unit limited to LPNs is appropriate.

I have considered the evidence and arguments presented on both of these issues. As discussed below, I have concluded that the LPNs are not supervisors because their role in the disciplinary process is merely reportorial and their assignment of work does not require the use of independent judgment. I have also concluded that the unit may appropriately exclude RNs because RNs are professional employees, the LPNs are not, and Section 9(b)(1) of the Act provides, in effect, that a mixed professional-nonprofessional employee unit cannot be the sole appropriate unit. Accordingly, I have directed an election in the petitioned-for unit of LPNs.

I. OVERVIEW OF OPERATIONS

The Employer operates a long-term care facility in Kankakee, Illinois. The facility is a one-story building, with an east and west wing, each wing containing four halls. The facility houses approximately 202 beds. The Employer's administrator is responsible for the overall operations of the facility. The director of nursing reports directly to the administrator and heads the nursing department, which includes approximately 25-30 certified nursing assistants, an unknown number of rehabilitation aids, and 20 nurses. Approximately half of the nurses are LPNs, the rest are RNs. The certified nursing assistants (CNAs) and rehabilitation aids, as well as certain other classifications, are currently represented by Petitioner in a separate unit.

The director of nursing schedules the nursing department employees. The nurses are assigned to one of three shifts: the day shift, 7 a.m. to 3:30 p.m.; evening, 3 p.m. to 11:30 p.m.; and night, 11 p.m. to 7:30 a.m. On day and evening shifts, two nurses are assigned to the west wing and one nurse to the east. On the night shift, one nurse is assigned to each wing. The CNAs are assigned to specific halls and patients on each shift.

All of the nurses are classified as charge nurses and covered by the same job description, which provides generally that the charge nurse is to organize and assign all jobs on her shift so that the "work load is evenly divided among his/her employees on the basis of staff

qualification, size and physical layout of the facility." The job description also provides, inter alia, that charge nurses are responsible for ascertaining that employees abide by facility policies. The director of nursing testified that all of the charge nurses have the same duties, authority, and responsibilities and enjoy the same terms and conditions of employment, except that the RNs are paid approximately 17 percent more than the LPNs.

II. SUPERVISORY STATUS OF THE LPNs

A. Overview of Applicable Law

Before examining the specific duties and authority of the LPNs, I will briefly review the requirements for establishing supervisory status. Section 2(11) of the Act defines the term supervisor as:

> Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The burden of proving supervisory status lies with the party asserting that such status exists. *National Labor Relations Board v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001). In order to prove supervisory status, the party asserting such status must follow the Act's three-part test. Employees are statutory supervisors if (1) they engage in any one of the 12 listed supervisory functions; (2) their "exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment", and (3) their authority is held in the interest of their employer. *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-574 (1994).

In enacting Section 2(11), Congress distinguished between true supervisors, vested with "genuine management prerogatives", and those who are entitled to protection of the Act even if they perform minor supervisory duties. S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947), cited in *Providence Hospital*, 320 NLRB 717, 725 (1996). The Board frequently warns against

construing supervisory status too broadly because an employee deemed a supervisor loses the protection of the Act. *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1114 (1997). The inquiry into supervisory status must differentiate between "the exercise of independent judgment and the giving of routine instructions, between effective recommendation and forceful suggestions, and between the appearance of supervision and supervision in fact." *Training School at Vineland*, 332 NLRB No. 152, slip op. at 5 (2000).

The Board retains discretion to determine, within reason, what scope or degree of "independent judgment" meets the statutory threshold. *Dynamic Science, Inc.*, 334 NLRB No. 57, slip op. at 1 (2001). The question of whether a certain group of employees are statutory supervisors is determined on a case-by-case basis through an examination of "actual job responsibilities, authority and relationship to management." *Noranda Aluminum, Inc. v. NLRB*, 751 F.2d 268, 269 (8th Cir. 1984). Proof of supervisory status cannot be satisfied by general conclusory claims or by proof of paper authority. *Franklin Home Health Agency*, 337 NLRB No. 132, slip op. at 4 (2002). Where evidence is inconclusive or in conflict, the Board will not find that supervisory status is established based upon such evidence. *Phelps Community Medical Center*, 294 NLRB 486, 490 (1989), cited in *North Shore Weeklies, Inc.*, 317 NLRB 1128, 1130 (1995). Lack of evidence also is construed against the party asserting supervisory status. *Michigan Masonic Home*, 332 NLRB No. 150, slip op. at 1 (2000).

The record contains no evidence and the Employer does not contend that the LPNs have the authority to hire, transfer, suspend, lay off, recall, promote, adjust grievances, discharge, responsibly direct, or reward employees or to effectively recommend such actions. The Employer contends that the LPNs have the authority to discipline and to assign. Accordingly, my analysis is limited to these two indicia.

B. Analysis

1. Discipline

The Employer has failed to establish that the LPNs have the authority to discipline employees or to effectively recommend discipline within the meaning of the Act. At hearing, the director of nursing testified that the LPNs have the authority to issue warnings to certified nursing assistants pursuant to the Employer's progressive discipline policy. Although the director of nursing testified that the LPNs can issue a "verbal written warning" without prior authorization, she also testified that before issuing such a warning, the LPN must first check with the director of nursing to determine whether or not the employee had previously received discipline so that the progressive procedure is followed properly. Moreover, upon receipt of a report of an infraction, the director of nursing reviews the situation with the LPN and also with the offending employee. The director of nursing also testified that she was unaware of any LPN recommending discipline other than a verbal warning. The Employer presented three-employee report forms signed by LPNs in support of its position. The first form provided for the discharge of a CNA. An LPN filled out and signed the portion of the form providing for a description of the incident. However, the decision to discharge the CNA as a result of the incident was made by the assistant director of nursing, who also signed the form. The second form was a verbal warning issued to a CNA. Again, the LPN filled out and signed the description of the incident. However, the decision to issue the form as a verbal warning was made by the director of nursing without a recommendation from the LPN. The third form was a warning issued to a CNA, which was filled out and signed by the LPN. However, the LPN did not witness the incident and was instructed to fill out the form by either the assistant director of nursing or the director of nursing.

The evidence presented at hearing establishes only that the LPNs report incidents of employee misconduct. The director of nursing then independently investigates the reported misconduct by speaking with the LPN and the employee involved. This reportorial function is

insufficient to establish supervisory status. *Franklin Home Health Agency*, 337 NLRB No. 132, slip op. at 5 (2002), *Vencor Hospital-Los Angeles*, 328 NLRB 1136 (1999). Even the charge nurse job description provides only that the LPNs are responsible for ascertaining that employees abide by facility policies, not that they are responsible for disciplining employees. The only evidence of disciplinary authority is the director of nursing's conclusionary testimony that the LPNs have the authority to issue warnings. This testimony was not supported by any specific evidence and was, in fact, contradicted by the testimony concerning the circumstances surrounding the issuance of the three disciplinary reports, as well as the director's own testimony that she independently investigates the incidents reported to her. This conclusionary testimony is insufficient to establish supervisory status. *Franklin Home Health Agency*, 337 NLRB No. 132, slip op. at 5 (2002); *Phelps Community Medical Center*, 294 NLRB 486, 490 (1989), cited in *North Shore Weeklies, Inc.*, 317 NLRB 1128, 1130 (1995). The general testimony that the LPNs recommend issuance of oral warnings is also unsupported by specific evidence. Moreover, the authority to effectively recommend means that the intended corrective action be taken without any independent investigation by a higher authority. *Children's Farm Home*, 324 NLRB 61 (1997). Such is not the case here.

2. Assignment

The Employer contends that the LPNs assign work. In its brief, the Employer specifically asserts that the LPNs can change CNA work assignments, transfer CNAs to different halls and can call in CNAs on their days off. The Employer has failed to establish, however, that the LPNs utilize independent judgment in the assignment of work.

It is undisputed that the director of nursing schedules all LPNs and CNAs. The schedules are prepared every 6 weeks. The director of nursing assigns the CNAs to a specific hall and to specific patients on a rotating basis. These assignments can be altered by the LPNs, however, if a CNA calls off work and if the director of nursing is not present at the facility. In this situation, the LPN solicits volunteers to replace the absent CNA from the staff currently

on duty. If no volunteers are secured, the LPN calls off-duty employees to see if they are available to work. The LPN simply utilizes the call list, starts at the top of the list and works her way down until she secures a volunteer. This situation may also require the LPN change a CNA's hall assignment to meet staffing requirements. If such a change is needed, the LPN usually solicits volunteers. The director of nursing testified that the LPN could choose whether to solicit volunteers or to simply change a particular CNA's assignment. No evidence was presented as to the basis for these choices.

The Employer has failed to establish that these decisions by LPNs require the use of independent judgment. Rather, the evidence establishes a routine procedure that LPNs follow when a CNA calls off work. Assignments made in accordance with an Employer's set practice, pattern or parameters does not require a sufficient exercise of independent judgment to satisfy the statutory definition. *Franklin Home Health Agency*, supra. Moreover, the LPNs reliance on volunteers and lack of authority to compel off-duty employees to report to work underline the absence of supervisory power. *Franklin Home Health Agency*, supra; *Harborside Healthcare, Inc*., 330 NLRB 1334, 1336 (2000). Although the LPNs can apparently force a CNA to transfer to a different hall, the record does not indicate how this decision is made. The absence of specific evidence establishing the use of independent judgment must be construed against the Employer as the party asserting supervisory status. *Michigan Masonic Home*, 332 NLRB No. 150, slip op. at 1 (2000). Moreover, the record does establish that the LPNs have no authority to alter the staffing levels and that the CNAs are scheduled on each hall on a rotational basis. Thus it is unlikely that the LPNs transfer CNAs based on any assessment of skills or other factor requiring the use of independent judgment. *Franklin Home Health Agency*, slip op. at 5; *Ten Broeck Commons*, 320 NLRB 806, 810 (1996). Although the charge nurse job description does generally provide that the charge nurse must assign all jobs on her shift so that the "work load is evenly divided among his/her employees on the basis of staff qualification, size and physical layout of the facility," the evidence does not support this authority in practice. The Board insists

on evidence supporting a finding of actual as opposed to mere paper authority. Thus, job descriptions or other documents suggesting the presence of supervisory authority are not given controlling weight. *Franklin Home Health Agency*, slip op. at 4; *Training School at Vineland*, 332 NLRB No. 152 (2002).

Although not mentioned in the Employer's brief, the evidence also establishes that the LPNs prepare a shift unit management form and other forms for each CNA. These forms communicate certain tasks for each resident to be performed by the CNA, such as shower, vital signs, weight, Foley catheter output and whether the resident has any appointments that day and what time the resident will be picked up. However, the assignment of these tasks is made pursuant to predetermined schedules, policies, and doctor's orders. No evidence was presented that the LPNs exercise independent judgment in the preparation of these forms. Similarly, although the director of nursing testified that LPNs frequently tell CNAs to shave residents or change their clothes or answer a call light, no evidence was presented that these directions are other than routine. In fact, the director of nursing admitted that these duties are the routine and that if the CNAs observe these needs prior to the LPN, the CNAs can attend to them without the direction of the LPN. Thus, the evidence fails to establish that any of these assignments require the LPNs to exercise independent judgment. *Franklin Home Health Agency*, supra.

III. APPROPRIATE UNIT

The Employer contends that the only appropriate unit must include RNs and LPNs because they are all classified as charge nurses and, as such, they share the same community of interest. However, the Board routinely finds RNs to be professional employees. *Centralia Convalescent Center,* 295 NLRB 42 (1989). Nothing in this record distinguishes the Employer's RNs from any other RNs. Thus, the record establishes that the Employer's RNs have the proper nursing degrees and are licensed as registered nurses. I must conclude therefore, that the Employer's RNs are professional employees. The Board also routinely finds that LPNs are

not professional employees. Rather, the Board normally finds LPNs to be technical employees. See *Park Manor Care Center Inc.,* 305 NLRB 872 (1991). Nothing in this record distinguishes the Employer's LPNs from any other LPNs; all of them are properly licensed as LPNs. In view of this precedent and in the absence of any evidence that the LPNs are professional employees, I conclude that the LPNs are nonprofessionals.

Section 9(b)(1) of the Act provides that professional employees may not be included in a bargaining unit with nonprofessionals unless they vote in favor of such inclusion. In *Leedom v. Kyne*, 249 F.2d 490 (D.C. Cir. 1957), the Court of Appeals construed the limitation of Section 9(b)(1) as intended to protect professional employees and held that the professionals' right to this benefit does not depend on Board discretion or expertise and that the denial of this right must be deemed to result in injury. The United States Supreme Court, at 358 U.S. 184 (1958), affirmed this ruling. Thus, the operative effect of Sec. 9(b)(1) is that a mixed professional-nonprofessional employee unit cannot be found, as a matter of law, to be the sole appropriate unit for collective-bargaining purposes. Otherwise, the statutory limitations set forth in Section 9(b)(1) would be without meaning since professional employees would either have to be represented as part of an overall unit or not at all. *South Hills Health System Agency*, 330 NLRB 653 (2000). Accordingly, I find that the petitioned-for unit limited to LPNs is appropriate.

IV. CONCLUSIONS AND FINDINGS

Based on the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will

effectuate the purposes of the Act to assert jurisdiction herein[3].

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6*)* and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time licensed practical nurses employed by the Employer at its Kankakee, Illinois facility EXCLUDING office clerical and professional employees, guards and supervisors as defined in the Act and all other employees.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by United Food and Commercial Workers Union, Local 881. The date, time, and place of the election will be specified in the notice of election that the Board's Subregional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately prior to the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which

[3] The Employer is an Illinois corporation engaged in the operation of a skilled care nursing and rehabilitation center. During the past calendar year, a representative period, the Employer has received gross revenues in excess of $100,000. In addition, during that same period of time, the Employer purchased and received goods valued in excess of $2,000 directly from vendors located outside the State of Illinois.

commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc*., 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Subregional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Subregional Office, 300 Hamilton Boulevard, Suite 200, Peoria, IL 61602, on or before **March 24, 2003**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be

grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (309) 671-7095. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Subregional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services,* 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **March 31, 2003.** The request may **not** be filed by facsimile.

Dated: March 17, 2003
at St. Louis, Missouri

Ralph R. Tremain, Regional Director, R-14
National Labor Relations Board

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